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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1545

ANN ZIPES, PAT SANTINI and PAMELA DAILING,
INDIVIDUALLY AND ON BEHALF OF A CLASS,
Petitioners,

vs.

TRANS-WORLD AIRLINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

ANN ZIPES, PAT SANTINI and PAMELA DAILING,
INDIVIDUALLY AND ON BEHALF OF A CLASS,
Petitioners,

vs.

TRANS-WORLD AIRLINES, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioners request that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit which was entered in the above cause (Docket No. 77-1325) on August 24, 1978.

OPINIONS BELOW.

The opinion of the Court of Appeals has been reported as *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142 (7th Cir. 1978). A copy appears in the Appendix (at pp. 1-17). The District Court's opinion has been reported at 17 Fair Empl. Prac. Cas. (BNA) 1512. A copy appears in the Appendix (at pp. 21-23).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 24, 1978. A Petition for Modification of Opinion was filed on September 7, 1978 and was decided on January 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The case arises under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (the "Act").

QUESTION PRESENTED.

Whether Congress intended the time-filing provision of § 706(d) of the Act to be beyond the reach of judicial doctrines of waiver and estoppel.

THE STATUTE INVOLVED.

§ 706(d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(d) (1970) (amended 1972):*

> "A charge . . . shall be filed [with the EEOC] within ninety days after the alleged unlawful employment practice occurred . . ."

§ 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) (1970):**

> "Each United States district court . . . shall have jurisdiction of actions brought under this title."

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* The Civil Rights Act of 1964, Title VII, §§ 701 *et seq.*, is referred to herein as "Title VII" or "the Act". Unless otherwise indicated, citations to the Act refer to the version in effect in 1970. In 1972 § 706(d) of the Act was amended and is now codified at 42 U.S.C. § 2000e-5(e) (1976); it is referred to herein as "§ 706(d)".

** Section 706(f) of the Act is presently codified at 42 U.S.C. § 2000e-5(f)(3) (1976); it is referred to herein as "§ 706(f)".

STATEMENT OF THE CASE.

During and prior to 1970, Respondent ("TWA") had a policy of terminating female flight cabin attendants ("hostesses") when they became mothers (by birth or adoption). No parenthood restrictions were imposed upon respondent's male flight cabin attendants.

On May 30, 1970, a charge was filed with the Equal Employment Opportunity Commission, challenging TWA's "no-mothers" employment practice. After the EEOC issued a right-to-sue letter under § 706(e) of the Act, the hostess' union and several individual ex-hostesses filed a timely suit in the District Court.

The Complaint was filed on August 18, 1970 on behalf of a class which was described as including all TWA hostesses who had been fired on account of parenthood after July 2, 1965 (the effective date of the Act). TWA's answer explicitly admitted that the Court had jurisdiction and made no assertion of any time-filing defense.

In 1971, TWA negotiated a settlement agreement with the union. At that time the class members were no longer members of the union. The settlement provided to the class members the right to re-employment as hostesses, but without back pay or retroactive seniority. With that settlement agreement in hand, TWA proposed (successfully) to the District Court a class definition which included all former hostesses who had been fired for parenthood since July 2, 1965. At the Rule 23, F.R.C.P. settlement hearing in March 1972, TWA's lawyer explicitly waived "any question of the statute of limitations". (App., A-28) Over the objections of petitioners and other class members, the District Court approved the settlement. TWA then presented an Order which recited "jurisdiction over the subject matter of this action and the parties hereto". During the Seventh Circuit's consideration of petitioners' appeal from the

approval of the settlement, TWA made no mention of any jurisdictional question.

The Seventh Circuit reversed. *ALSSA* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974). On remand, Petitioners were appointed to replace the union as class representatives. On September 11, 1974, after more than four years of litigation, TWA first presented its defense under § 706(d) in the form of a motion for leave to amend its answer. The District Court granted TWA leave to amend on condition that TWA later prove that "the plaintiffs suffered no prejudice or that the delay in amendment was excusable." (App., A-27) TWA made no effort thereafter to satisfy the aforesaid conditions. On December 16, 1975, TWA moved to exclude from the class all hostesses who had been fired more than 90 days prior to the filing of the EEOC charges. The motion was denied and summary judgment was granted to the plaintiff class on the issue of liability, from both of which rulings TWA took interlocutory appeals to the Seventh Circuit under 28 U.S.C. § 1292(b).

The Seventh Circuit reversed the District Court's order on the scope of the class, holding that the 90 day filing requirement was "jurisdictional" and that therefore Plaintiffs' arguments regarding estoppel and waiver could not be considered. Accordingly, the Court of Appeals restricted class membership to those persons whose terminations occurred within 90 days prior to the filing of the EEOC charge and excluded all of the other members (including Petitioners) of the class which was certified in the District Court.

REASONS FOR GRANTING THE WRIT.

I.

This Issue Has Previously Been Reviewed, But Was Not Decided, by This Court.

The issue involved here is almost identical to the issue concerning which this Court granted certiorari on February 22, 1977. *Shell Oil Company* v. *Dartt*, 429 U.S. 1089 (1977).

In *Dartt*, the plaintiff had argued in the Tenth Circuit that the employer was estopped to assert the time-filing defense under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.* (1976). *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256, 1258-1259 (10th Cir 1976). The Tenth Circuit viewed the time-filing requirements under ADEA and Title VII as being analogous* and therefore drew upon Title VII precedents in determining whether equitable modification was available to plaintiff. 539 F.2d at 1259-1260. The Tenth Circuit Court of Appeals interpreted the 180 day filing requirement as being subject to tolling and estoppel. 539 F.2d at 1256, 1260-1261. Because of an equally divided court, this Court affirmed without deciding the question. *Shell Oil Company* v. *Dartt*, 434 U.S. 99 (1977) (*per curiam*).

II.

There Is a Conflict in the Circuits.

The Question Presented has been decided by four Ciruit Courts of Appeals. In *Reeb* v. *Economic Opportunity Atlanta,*

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* The relevant provision under the ADEA stated:

"No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred. . . ." 29 U.S.C. § 626(d)(1) (1976).

Inc., 516 F.2d 924, 928 (5th Cir. 1975) and *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied* 434 U.S. 1086 (1978), the Courts of Appeals for the Fifth and District of Columbia Circuits ruled that the § 706(d) requirement is a "statute of limitations" rather than a "jurisdictional prerequisite", and that therefore the courts are not bound to turn deaf ears to claims of estoppel, waiver and tolling. The Eighth Circuit, in *Hinton* v. *CPC International, Inc.*, 520 F.2d 1312, 1315 (8th Cir. 1975), and the Seventh Circuit, in the case *sub judice*, have ruled contra to the Fifth and D. C. Circuits.

The Second Circuit regards the question as being "still open". *Egelston* v. *State University College*, 535 F.2d 752, 755 n.5 (2nd Cir. 1976); *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978).

In cases arising under the ADEA, the Seventh Circuit itself, along with the Third and Tenth Circuits, has ruled that the time-filing requirement is subject to traditional equitable modifications. *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert. denied*, 99 S.Ct. 87 (1978). The Sixth Circuit indicated to the contrary in *Ott* v. *Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975), although in *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), *petition for cert. filed*, 47 USLW 3015 (U.S. July 25, 1978) (No. 78-1), the Sixth Circuit stated that the "jurisdictional" statement in *Ott, supra*, had been used "in the loose sense" and was dictum. 573 F.2d at 954 n.15.

III.

The Time-Filing Provision of Section 706(d) Reflects No Congressional Intention to Deem Compliance as a Condition of Subject Matter Jurisdiction.

Subject matter jurisdiction is nothing less than the power of the court to hear the matter. *Cooper* v. *Reynolds*, 77 U.S. (10 Wall.) 308, 316 (1870); *West Coast Exploration Co.* v. *McKay*, 213 F.2d 582, 591-592 (D.C. Cir.), *cert. denied*, 347 U.S. 989 (1954); *Noxon Chemical Products Co.* v. *Leckie*, 39 F.2d 318, 320 (3d Cir.), *cert. denied*, 282 U.S. 841 (1930). But subject matter jurisdiction depends only on the *nature* of the case; if the case arises out of the laws of the United States, federal courts have jurisdiction. *Cohens* v. *Virginia*, 19 U.S. 90, 6 Wheat. 264 (1821). Section 706(f) of the Act states that the district courts "shall have jurisdiction of actions brought under this title."

Statutes which create new rights of action are sometimes interpreted to mean that the time-filing provisions contained therein must be obeyed lest the newly created right of action be extinguished, as compared with ordinary statutes of limitations which merely bar the *remedy*. Whether a limitations provision should be so construed is always a matter of determining Congress' intention. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 556-559 (1974); *Burnett* v. *New York Central R.R.*, 380 U.S. 424, 427 n.2 (1965).

In *Guy* v. *Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975), the time allowed under § 706(d) expired prior to the filing of plaintiff's EEOC claim. Thereafter, Congress amended the Act to lengthen the filing period to 180 days; plaintiff then filed her EEOC charge prior to the 180th day. The Sixth Circuit Court of Appeals held, *inter alia*, as follows:

> "The limitation in Title VII is more than a mere statute of limitations. The Act creates a right and liability which did not exist at common law and prescribes the remedy. The

> remedy is an integral part of the right and its requirements must be strictly followed. If they are not, the right ends." 525 F.2d at 127.

This Court reversed on this point. *Electrical Workers Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). Had this court viewed § 706(d) as setting a condition of the right such that failure to comply therewith would extinguish the right of action, it would have held unconstitutional a Congressional attempt to revive a right of action which had already been extinguished; instead, this Court explicitly rejected that notion.*

Furthermore, if § 706(d) laid down a "precondition to the right" or was truly jurisdictional in the subject matter sense, *nothing* would cause its command to succumb. Yet, compliance with § 706(d) by one aggrieved victim undisputably obviates the necessity for any other victim to file an EEOC charge. See *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 2467 n.6 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772 (1976); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 n.8 (1975).

Absent any legislative history to indicate to the contrary, a statutory time-filing requirement will be read in light of the deeply rooted principle that equity and fairness will sometimes require tolling or other modification. *Glus* v. *Brooklyn Eastern Dist. Teminal*, 359 U.S. 231 (1959). Thus, in cases arising under the World War Veterans Act, 38 U.S.C. § 445 (1952), the time-filing defense has consistently been modified by the doctrines of waiver and estoppel. See, e.g., *United States* v. *Ellison*, 74 F.2d 864, 869 (4th Cir.), *cert. den.*, 295 U.S. 750 (1935). Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b) (1976), which is the administrative filing provision, has consistently been construed as a statute of limitations which may be waived unless timely

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* This precise issue was squarely before the Court. See Brief for the Respondent, pp. 17-18, and transcript of the oral arguments, pp. 33-40, *Electrical Workers Local 790* v. *Robbins & Myers, Inc.*, Supreme Court Doc. Nos. 75-1264 and 75-1276.

asserted. *A. H. Belo Corp.* v. *NLRB*, 411 F.2d 959, 967 (5th Cir. 1969), *cert. den.*, 396 U.S. 1007 (1970).*

The Seventh Circuit based its "jurisdictional" decision on the absence of Congress' expressed intention to the contrary. (App., A-15) The inquiry should be the other way around, viz: Is there anything which shows that Congress intended that § 706 (d) should *not* be subjected to the traditional judicial doctrines of waiver and estoppel?

IV.

The Doctrines of Waiver and Estoppel Are Appropriate to This Case.

A. TWA Should Be Estopped from Asserting the § 706(d) Defense.

With a costless settlement in hand, TWA, seeking to bind the entire post-1965 class, proposed an Order which confirmed the District Court's jurisdiction over all of the class members. Only after the Seventh Circuit overturned the settlement, and the strategy** of quieting all claims for all time became a failure, did TWA play its trump card under § 706(d).

A litigant should not be allowed to use jurisdictional arguments to play fast and loose with the courts. *Alger* v. *Hayes*, 452 F.2d 841 (8th Cir. 1972); *Di Frischia* v. *New York Central R.R.*, 279 F.2d 141, 144 (3d Cir. 1960); *Scarano* v. *Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

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* The significance of § 10(b) of the NLRA as being subject to waiver is two-fold: (1) Title VII's statutory scheme was patterned after the NLRA. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 419 n.11 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976); and (2) § 10(b) of NLRA is even more stringently worded than § 706(d) of Title VII. The NLRA provision states:

> "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." 29 U.S.C. § 160(b) (1976).

** One of the grounds for reversal was the deprivation of the class members' opt-out privileges under Rule 23(c)(2), F.R.C.P. *ALSSA* v. *American Airlines, Inc.*, 490 F.2d 636, 642-643 (7th Cir. 1973), *cert. denied* 416 U.S. 993 (1974).

B. TWA Waived the § 706(d) Defense.

Rule 8(c), F.R.C.P. requires that:

> ". . . a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense."

Even the defense of lack of jurisdiction must either be asserted in the responsive pleading or by motion "made before pleading. . . ." Rule 12(b), F.R.C.P. TWA's failure timely to plead the defense, its explicit open-court waiver in 1972 and its failure to satisfy the District Court's conditions subsequent in granting TWA leave to amend its Answer in 1974, waived TWA's right to assert the § 706(d) defense. Time-filing restrictions confer technical defenses, the purpose of which is to avoid stale claims.* That policy logically applied to TWA's stale *defense*, as well.

Even assuming, *arguendo*, that the Seventh Circuit was correct to the extent that § 706(d) establishes a precondition to a Title VII victim's right of action, the Seventh Circuit went too far in characterizing compliance with § 706(d) as affecting subject matter jurisdiction. The affirmative defense under § 706(d) should have been deemed waived and TWA should have been estopped to assert it. At a minimum, this case should have been remanded to the District Court for determination of the factual issues involved in the waiver and estoppel issues.

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* Senator Case, one of the floor managers in the Senate of the House Bill, H.R. 7152, stated that the six-month limit on filing with the Commission contained in that bill was "to avoid the pressing of 'stale' claims." 110 Cong. Rec. 7243 (1964). Senator Humphrey, commenting on the differences between H.R. 7152 and the substitute Senate bill, S. 656, which was eventually passed by the Senate, referred to its 90-day time period as a "period of limitations." *Id.* at 12723.

CONCLUSION.

For the reasons stated herein, a writ of certiorari should issue to the Seventh Circuit Court of Appeals and the judgment should be reversed and this cause should be remanded with instructions to:

(a) affirm the District Court's denial of Respondent's motion to exclude [certain class members] from the class, or, in the alternative,

(b) remand this cause to the District Court for determination of the factual issues involved in Petitioners' claims of waiver and estoppel.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-1325

In re:

CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES.

Appeal of:

AMERICAN AIRLINES, INC., and TRANS WORLD AIRLINES, INC.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 70 C 2069, 70 C 2071, 72 C 498, 74 C 2063 and 74 C 2762—Frank J. McGarr, *Judge.*

Argued January 26, 1978—Decided August 24, 1978.

Before FAIRCHILD, *Chief Circuit Judge,* PELL and SPRECHER,* *Circuit Judges.*

PELL, *Circuit Judge.* This is an interlocutory appeal under 28 U. S. C. § 1292(b) of two district court orders. Pretrial proceedings in the district court involved consolidated Title VII[1] class action suits by female flight cabin attendants against American Airlines, Inc. and Trans World Airlines, Inc. (TWA).

* Although Judge Sprecher heard oral argument, he later disqualified himself from any participation in the decision, and preparation of the opinion, in this case.

1. Title VII, Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*

Subsequent to the filing of this appeal, American entered into a settlement agreement which was challenged and approved on appeal. *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, No. 77-2098 (7th Cir. Mar. 14, 1978).

The October 18, 1976 Order

TWA thus remains as the only appellant and appeals from the district court's summary judgment order of October 18, 1976, which held TWA's "motherhood" restrictions prior to October 1970 to be a violation of § 703(a) of the Civil Rights Act, 42 U. S. C. § 2000e-2(a).[2] Specifically, TWA maintained a policy of removing female flight cabin attendants from flight duty while pregnant, and thereafter if a child was born. This policy also extended to female flight cabin attendants who adopted a child. These employees who became mothers either by childbirth or by adoption were terminated permanently unless they were willing to accept employment in ground duty positions. This policy, however, did not apply to their male counterparts. Male cabin attendants, designated "pursers" by TWA, could remain on flight duty after becoming a parent. Although pursers served on international flights, their responsibilities were

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2. This section provides:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U. S. C. § 2000e-2(a).

substantially the same as those of female flight cabin attendants.[3]

TWA challenges the summary judgment on the grounds that: (1) its policy was not gender-based and therefore did not constitute sex discrimination: (2) its policy did not have a discriminatory effect; and (3) if the policy did discriminate on the basis of sex, the discrimination was a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of TWA's business.[4]

To clarify the challenged portion of TWA's policy, the plaintiff class does not challenge that aspect of TWA's policy which removed female flight cabin attendants from flight duty when they became pregnant. Furthermore, the district court's order, by reference to an earlier order involving American Airlines, specifically stated that this aspect of the policy was not discriminatory. *See Condit* v. *United Air Lines*, 558 F. 2d 1177 (4th Cir. 1977), *cert. denied*, 46 U. S. L. W. 3581 (Mar. 21, 1978). At issue then is only the policy of requiring female cabin attendants who become mothers to resign or accept ground duty positions while not imposing similar restrictions on their male counterparts who become fathers.

In arguing that its policy was not gender-based, TWA relies on *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), in which the Supreme Court held that General Electric's disability benefit plan did not violate Title VII even though it failed to cover pregnancy-related disabilities. To draw support for its argument from *Gilbert*, TWA appears to focus on the maternity

3. *See Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429, 439-42 (D. C. Cir. 1976), *cert. denied*, 46 U. S. L. W. 3527 (Feb. 21, 1978).

4. 42 U. S. C. § 2000e-2(e) provides in pertinent part:

> [i]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

leave aspect of its policy and to minimize addressing the only portion of the policy that is at issue, the no-motherhood restriction. *Gilbert* clearly provides no support for the proposition that TWA's no-motherhood policy withstands Title VII scrutiny.

TWA's no-motherhood policy in our opinion provides a clear example of sex discrimination prohibited by § 2000e-2(a). The Supreme Court, in applying that provision, has held that an employer may not refuse to hire women with pre-school-age children while hiring men with such children. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971). TWA's policy discriminated in the same manner.

TWA next argues that its policy did not have a discriminatory effect. This argument is irrelevant. In Title VII cases, discriminatory effect becomes an issue when the employer has a facially neutral practice. In those cases, the plaintiffs can establish a prima facie case by proving that the practice has a discriminatory effect. *See Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977). We need not reach that issue in the present case because TWA's policy was discriminatory on its face.

Finally, TWA argues that if its policy did discriminate on the basis of sex, the discrimination was a BFOQ reasonably necessary to the normal operation of TWA's business. The BFOQ, often described as an exception to Title VII's general prohibition of sex discrimination, is, at least in the view of one commentator, more accurately designated as a justification for sex discrimination.[5] TWA argues that its no-motherhood policy, albeit discriminatory, was justified as a BFOQ because (1) mothers of young children would have unacceptably high rates of absenteeism, (2) mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis, and (3) mothers

5. For a thorough discussion of the legislative history and the current judicial interpretations of the BFOQ, see Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tex.L. Rev. 1025, 1027-33, 1042-50 (1977).

returning from maternity leaves of absence would require expensive retraining.

Our analysis of the BFOQ issue must begin with the Supreme Court's most recent pronouncement in *Dothard* v. *Rawlinson, supra* at 334.

> We are persuaded—by the restrictive language of § 703(e) [§ 2000e-2(e)], the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

The Court, in a footnote, also stated that the EEOC's narrow construction of the statute, 29 C.F.R. § 1604.2(a), can be given weight. 433 U. S. at 334 n. 19. The lower court interpretations of the BFOQ prior to *Dothard* are not entirely consistent.[6] In view of the Supreme Court's recent approbation of "an extremely narrow" construction, we are of the opinion that the Ninth Circuit's construction is the most appropriate. In *Rosenfeld* v. *Southern Pacific Co.* 444 F. 2d 1219 (9th Cir. 1971), that court stated that

> based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception.

444 F. 2d at 1225. Thus, attributes that are culturally more common to one sex than the other are an insufficient basis for a BFOQ. Cultural stereotypes should not be employed to justify sex discrimination.

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6. *Compare Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969), *with Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (5th Cir.), *cert. denied*, 404 U. S. 950 (1971). *See also Usery* v. *Tamiami Trail Tours Inc.*, 531 F. 2d 224 (5th Cir. 1976). A perceptive analysis of these cases, as well as a comprehensive survey of developments in Title VII jurisprudence, is provided in Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. Ill. L. F. 69.

With this background, we now turn to the three issues which TWA argues present genuine issues of material fact on the BFOQ issue sufficient to defeat summary judgment. First, TWA argues that mothers, but not fathers, of young children would have an unacceptably high rate of absenteeism. They submit that absenteeism is a serious problem among flight attendants. This alone, of course, does not address the critical issue of whether female parents have a sexual characteristic different than male parents which would cause them to be absent more often. TWA, in an attempt to raise a genuine issue of material fact, points to the deposition of David J. Crombie, Vice-President of Industrial Relations at TWA, which states that problems of absenteeism have been exacerbated since TWA permitted mothers on flight duty. This is insufficient to defeat summary judgment because he does not attribute the increased absenteeism problem directly to the mothers. Indeed, he presents no evidence nor even states that mothers were absent more often than fathers, information, if it exists, that surely would be available to him.[7] TWA, in its brief, can only state that "[t]he airlines *could not be sure* that absenteeism among flight attendants with young babies would not increase greatly." [Emphasis added.] The whole tenor of its argument is speculative and relies heavily on stereotypical assumptions, a posture which is anathema to the maturing state of Title VII analysis.

TWA next argues that it raised a genuine issue of material fact as to a BFOQ in its allegation that mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis. In support of this allegation TWA primarily offers affidavits of Dr. L. G. Lederer, Corporate Medical Director of

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7. TWA terminated its no-motherhood policy in October 1970 and thus has had several years to assess the absenteeism problem of mothers *vis-a-vis* fathers, if such a problem exists, and to determine whether it is linked to a sex characteristic.

American Airlines, Dr. Charles C. Gullett, Corporate Director Medical Services & Safety Engineering for TWA, and the deposition of David J. Crombie.

Dr. Lederer's affidavit states that a mother's concern for her child, when combined with irregular hours and absences from home at distant locations, would produce psychological stresses which could impair the proper performance of her flight duties. This is insufficient to defeat summary judgment because he fails to contrast the potential effect on performance with that of fathers, the critical issue in this case. Indeed, within the same paragraph, Dr. Lederer states that frequent absences from home and irregular work hours as experienced by *firemen* and *salesmen* contributed to unstable marriages. Therefore, it is not at all clear that his conclusions regarding effects on performance are gender-related.

Dr. Gullett's affidavit includes statements similar to those of Dr. Lederer and accordingly fails to defeat summary judgment for the same reasons. Mr. Crombie's deposition similarly fails to raise a genuine issue of material fact. He stated in a conclusory fashion that "the mother of children *could* be so preoccupied with her cares that she *might* be deficient in the performance of those aspects of her job relating to safe transport. . . ." [Emphasis added.] Aside from our uncertainty as to Mr. Crombie's expertise to make such a judgment, we are not persuaded that his conclusions are not based on sex stereotyping that Title VII seeks to eliminate from the employment setting. As this court stated in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U. S. 991 (1971), § 703(a)(1) "subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past." Furthermore, Mr. Crombie's statements do not address the question of whether mothers have a sex characteristic, different than fathers, that would impair their job performance to a greater extent. Characteristics that might, to one degree or another, correlate with a particular sex

are insufficient to provide the basis for a BFOQ. *Rosenfeld* v. *Southern Pacific Co., supra* at 1225. To accept Mr. Crombie's statements as sufficient to raise a genuine issue of material fact requires acquiescence in assumptions steeped in cultural stereotypes, such as that female parents have a more intense concern for their children than male parents, assumptions that are inconsistent with the purposes of the Act.

TWA's third argument to defeat summary judgment is that it raised an issue of fact as to the existence of a BFOQ by its allegation that mothers returning from maternity leaves would require expensive retraining. We are unpersuaded by this argument because it seems clear that retraining a mother returning from maternity leave, albeit an expense to TWA, would be less expensive than training her replacement.

We have examined all the other relevant affidavits, depositions, and documents in the record and find them of no additional support to TWA's challenge to the district court's summary judgment. Accordingly, for the reasons stated herein, we hold that the district court properly granted summary judgment in favor of the plaintiffs.[8]

The October 15, 1976 Order

TWA moved to exclude certain persons from the plaintiff class for lack of subject matter jurisdiction. The class was defined as all female flight cabin attendants who were terminated

8. Our decision to affirm the summary judgment here may appear inconsistent with language in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544 (1971), where the Court, in vacating and remanding a sex discrimination case stated that "conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act." This language, however, does not categorically state that such considerations, if proved, would constitute a BFOQ. Indeed, after *Dothard* v. *Rawlinson*, 433 U. S. 321, 334 (1977), in which the Court accepted an "extremely narrow" construction of the BFOQ, the court may well be unwilling to accept such considerations as sufficient to constitute a BFOQ. Furthermore, in *Phillips*, the defendant did not raise the BFOQ defense in the lower court and thus the issue was not directly before the Supreme Court.

from employment with TWA on or after July 2, 1965 for reasons of pregnancy.[9] TWA's motion sought to exclude from this class all those employees who were terminated more than 90 days prior to May 31, 1970, the date the original plaintiff class filed its charge with the EEOC. TWA argues that these employees did not fulfill the jurisdictional requirement that a charge must be filed with the EEOC within 90 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(d) (1970 ed.).[10]

The district court denied TWA's motion on the ground that the alleged unlawful employment practice was a "continuing violation" so that even though the termination may have occurred more than 90 days before the plaintiff class filed its charge with the EEOC, the no-motherhood policy, which caused not only termination, but also the failure to reinstate, continued into the 90-day period and itself constituted an unlawful employment practice which continued until TWA abandoned the policy in October 1970.

The continuing violation theory was created to add some flexibility to an otherwise rigid jurisdictional filing requirement that might often result in the denial of Title VII remedies to employees who have suffered employment discrimination. Although the purpose of the theory is admirable, an application of the theory in its broadest terms would vitiate the filing requirement which, as a jurisdictional prerequisite, also deserves proper respect. Accordingly, we must define the legitimate scope of this theory and determine whether TWA's conduct falls within it.

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9. Since the pregnancy leave policy is not challenged, but rather the refusal to reinstate after a child is born, we assume the class includes only those who would have resumed flight duty after becoming a mother but for TWA's policy forbidding this.

10. In 1972, this section was amended to extend the time limit to 180 days and was renumbered § 2000e-5(e). The amendment does not apply to the present case because these proceedings were initiated in 1970.

Courts which have applied the continuing violation theory have not addressed the precise issue in the present case. In *Cox* v. *United States Gypsum*, 409 F. 2d 289 (7th Cir. 1969), several female employees were laid off more than 90 days prior to filing charges with the EEOC. They claimed a continuing violation on the basis that male personnel were hired to perform jobs which the plaintiffs were qualified to perform between the time plaintiffs were laid off and the time they filed their charges. This court held that although a charge filed more than 90 days after a layoff would be untimely, the plaintiffs' allegations suggested discriminatory recalls sufficient to show that the violation continued up to the filing of charges. 409 F. 2d at 290. *Accord, Macklin* v. *Spector Freight Systems*, 478 F. 2d 979 (D. C. Cir. 1973). *See also Bartmess* v. *Drewrys U. S. A., Inc.*, 444 F. 2d 1186, 1189 (7th Cir. 1971), *cert. denied*, 404 U. S. 939.

When the alleged unfair employment practice culminates in termination of employment rather than a layoff, courts have been unwilling to apply the continuing violation theory. In *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806 (7th Cir. 1975), the plaintiffs filed their EEOC charge more than eleven months after they were terminated. This court, quoting an opinion of the Eighth Circuit, stated that

> to construe loosely "continuing" discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, . . . even though on layoff, . . . we do not think this theory has validity when asserted by a former employee.

519 F. 2d at 808. For this reason the court held that the EEOC charges were untimely filed and that the court consequently lacked jurisdiction.

The present case is distinguishable from *Cox* because it does not involve layoffs and from *Terry* because *Terry* did not involve the continuation of an articulated policy denying rein-

statement for discriminatory reasons.[11] It is also distinguishable from the Supreme Court's recent opinion in *United Air Lines* v. *Evans*, 431 U. S. 553 (1977). In *Evans*, the plaintiff was terminated in 1968 because of United's no-marriage rule. United discontinued the rule in 1969 and the plaintiff was hired as a new employee in 1972. In 1973, she filed charges with the EEOC and argued that her employment in 1972 without seniority continued the discriminatory effects of the original termination. The Court responded that the hiring practices in 1972 were not discriminatory and that these hiring practices merely gave some present effect to past discrimination. Such "present effect" is not enough to state a claim under Title VII, however, and the Court stated that "the critical question is whether any present *violation* exists." 431 U. S. at 558 (emphasis in original). Whether any present violation would have existed had the plaintiff filed while the no-marriage policy was still effective or within 90 days of its discontinuation, was not decided and, in essence, is the issue before us now.[12]

Although, as we have indicated, there are no cases directly on point, we are unwilling to extend the continuing violation theory, as did the district court, so as to include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges. We attach sig-

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11. This latter question of whether the continuation of a discriminatory policy which denies reinstatement constitutes a continuing violation was specifically left open by the Ninth Circuit. In *Collins* v. *United Air Lines, Inc.*, 514 F. 2d 594 (9th Cir. 1975), the plaintiff was forced to resign under a "no-marriage" policy. The policy was then changed and three years later the plaintiff filed a charge with the EEOC. The court held the filing untimely, but specifically stated that it expressed no opinion concerning whether a charge filed within 90 days of the discontinuance of the no-marriage policy would have been timely. 514 F. 2d at 596 n. 2.

12. Neither the EEOC nor the courts have construed *Evans* as eliminating entirely the continuing violation theory. *See* EEOC Interpretative Memorandum, 46 U. S. L. W. 2028 (July 19, 1977); *Caldwell* v. *Seaboard Coastline Railroad*, 435 F. Supp. 310 (W. D. N. C. 1977).

nificant weight to that point in time when the employment relationship is permanently severed, and we are not alone in this regard. In *Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429 (D. C. Cir. 1976), the court stated in a similar Title VII class action context that

> [a] severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof. To hold otherwise would effectively read the timely-filing requirement out of the statute.

567 F. 2d at 473. *Accord, Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 (3d Cir.), *cert. denied*, 421 U. S. 1011 (1975); *Terry* v. *Bridgeport Brass Co.*, *supra* at 808; *Collins* v. *United Air Lines, Inc.*, 514 F. 2d 594, 596-97 (9th Cir. 1975). Arguably, the source for the continuing violation is not the termination itself, but the subsequent refusal to reinstate because of the same policy that led to the initial termination. We are of the opinion, however, that the terminations in the present case, which occurred pursuant to a policy which explicitly included a refusal to reinstate, are not meaningfully different than discriminatory terminations which do not articulate a policy of refusing reinstatement. In most cases in which an employee is discharged for discriminatory reasons, his or her opportunity for reinstatement is generally foreclosed for the same discriminatory reasons, but courts have required that employee to file an EEOC charge within 90 days after the termination. The addition of an articulated policy precluding reinstatement should not require a different rule. Therefore, it is the continuity of the employment relationship that sustains the violation, and when that relationship is severed, the violation ceases.

Those employees in the present case who were terminated but reinstated in ground duty positions after their maternity leave pursuant to TWA's policy, are in a different position. These

employees were properly included in the class because they were subject to a continuing violation. When they resumed employment after becoming a mother, the discriminatory violation, which lay dormant during their pregnancy, was revived; that they were forced to accept a presumably less preferable ground duty position while new employees were hired for flight duty revived the violation and rendered it as to them a continuing one. The position of these employees is closely analogous to the layoffs followed by discriminatory recalls held to be continuing violations in *Cox* and *Macklin*, both *supra*. It is also analogous to a discriminatory failure to promote, held to be a continuing violation in *Clark* v. *Olinkraft, Inc.*, 556 F. 2d 1219, 1223 (5th Cir. 1977), *cert. denied*, 46 U. S. L. W. 3527 (Feb. 21, 1978). *See also Caldwell* v. *Seaboard Coastline Railroad*, 435 F. Supp. 310 (W. D. N. C. 1977). Every time TWA hired a new flight cabin attendant, instead of transferring one of the former stewardesses now on ground duty, it perpetuated the initial violation.

The distinction we have drawn between those terminated employees who returned to employment in ground duty positions and those who did not renew the employment relationship is a delicate but nonetheless important one. The returning employee remains within the ambiance of a continuing relationship of employment and supervision and thus is directly subject to the employer's discriminatory actions. The non-returning employee is outside this ambiance and thus feels at most only the indirect reverberations of those actions. Although the non-returning employee who did not desire to remain as a TWA employee in a non-flight position may arguably suffer some form of discrimination whenever the employer hires a new flight cabin attendant instead of reinstating the terminated employee, the discriminatory impact is diffuse and uncertain. Permanent severance of the employment relationship destroys the ties through which the direct impact of discrimination may be transmitted.

TWA points out with some cogency the inherent difficulties of determining back pay if all members of the class were found entitled to prove what TWA characterizes as "these stale claims": each claim will require adjudication of whether termination was for any reason other than discrimination; a claimant may not recover if she was guilty of concealment of pregnancy; she may not recover if she left work for family reasons; amounts earned or earnable with reasonable diligency by each claimant in other work during recoverable years must be determined in order to reduce back pay under the express provisions of § 706(g); and the evidence concerning the individual and personal facts of hundreds of these claims is sure to be vague and unreliable.

While all of these aspects may be true, we do not deem that difficulty of ascertainment per se is a ground for denying relief where it is legally due. Nevertheless, we cannot put this factor entirely aside in determining the Congressional intent in requiring claims to be litigated only if filed with the EEOC within 90 days after the alleged unlawful employment practice occurred.

We hold therefore that the class members who satisfy the jurisdictional 90 day filing requirement are those employees who were terminated permanently[13] during the 90 days prior to the filing of EEOC charges and those employees who were removed from flight duty on or after July 2, 1965 and before the filing of EEOC charges but who were reinstated in ground duty positions and who continued their employment into the 90-day period. While we might rather safely assume that those employees who returned to work in a ground capacity would have preferred to reassume the literally and figuratively higher status of cabin attendants, nevertheless it is not a necessarily true

13. The proper time for the 90-day period to begin to run is the time of *permanent* termination. Although TWA argues otherwise, we interpret the effect of its policy as resulting in permanent termination when a child was born or adopted. Prior to that time the severance from employment was in actuality a mandatory maternity leave. This is apparent from the fact that a pregnant employee was free to resume employment in flight duty after a miscarriage or in ground duty after childbirth.

conclusion and therefore these employees must also show that during the 90-day period they were qualified to and would have accepted flight duty had it not been for TWA's policy.

As to those employees who have failed to file timely charges with the EEOC, who were terminated more than 90 days before filing of EEOC charges and who did not resume employment in ground duty positions, we must now consider whether the employer waived this timeliness defense by failing to plead it affirmatively in its answer. There is no dispute that the employer failed to raise this issue in the pleadings. The critical issue is whether the 90-day period is in the nature of a statute of limitations in which case the doctrines of waiver and estoppel would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time.[14] We hold the 90-day filing period to be jurisdictional and therefore the employer's failure to plead it did not constitute a waiver.

The language of the statute is clear:

> A charge under subsection (a) of this section *shall be filed* within ninety days after the alleged unlawful employment practice occurred.

42 U. S. C § 2000e-5(d) (1970 ed.) (emphasis added).[15] Furthermore, having examined the legislative history of this provision, of which there is very little, we find nothing of significance to indicate that the 90-day filing requirement is not jurisdictional. *But cf. Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429, 475 n. 345 (D. C. Cir. 1976). In *Terry* v. *Bridgeport Brass Co., supra,* the plaintiffs' Title VII suit was dismissed in the district court because they failed to file charges with the EEOC within 90 days of the alleged unfair employment practice. On appeal, this court affirmed the dismissal stating that "[t]he district court therefore correctly concluded that the charges were untimely filed and that it consequently lacked juris-

14. Fed. R. Civ. P. 12(h)(3); *United States* v. *Griffin*, 303 U. S. 226, 229 (1938).

15. *See* note 10 *supra.*

diction." 519 F. 2d at 808.[16] Moreover, the Supreme Court has, on several occasions, referred to the 90-day filing requirement as a jurisdictional prerequisite. *See United Air Lines, Inc.* v. *Evans, supra* at 555 n.4; *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973). Therefore, the employer's failure to raise the filing requirement earlier does not constitute a waiver, nor is the employer estopped from raising it.

The plaintiffs argue that the employer's statements at a March 17, 1972 settlement hearing constitute an express waiver of the filing requirement issue. Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver.

Plaintiffs also argue that the employer should be estopped from raising the filing requirement because the employer failed to raise it during the many lengthy proceedings which preceded the employer's motion to amend its answer to raise the issue. Plaintiffs characterize this conduct as "playing fast and loose

16. *See also Gibson* v. *Kroger Co.*, 506 F. 2d 647, 650 (7th Cir. 1974), *cert. denied*, 421 U. S. 914 (1975); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811, 821 n. 6 (7th Cir. 1972); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 718 (7th Cir. 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F. 2d 357, 359 (7th Cir. 1968).

Other circuits are split on this issue. *See, e.g., Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429, 475 (D. C. Cir. 1976); *Dartt* v. *Shell Oil Co.*, 539 F. 2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided Court*, 46 U. S. L. W. 4021 (Nov. 29, 1977); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 n. 8 (3d Cir.), *cert. denied*, 421 U. S. 1011 (1975); *East* v. *Romine, Inc.*, 518 F. 2d 332, 336-37 (5th Cir. 1975); *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 928-29 (5th Cir. 1975); *Olson* v. *Rembrandt*, 511 F. 2d 1228, 1231 (8th Cir. 1975).

Olson was the 8th Circuit case quoted in *Terry*. We have earlier in this opinion quoted from *Terry* in connection with the discussion of the continuing violation issue. We note that the 8th Circuit did refer to "the statute of limitations" in the *Olson* opinion. *Terry*, however, clearly proceeded on the basis of jurisdiction.

with the courts," and contend that such conduct is grounds for estoppel. We do not condone the employer's delay in raising the jurisdiction issue, but neither do we accept the plaintiffs' argument that the delay should estop TWA from raising subject matter jurisdiction. The cases plaintiffs cited in support of their estoppel theory either did not involve subject matter jurisdiction, *Alger* v. *Hayes*, 452 F. 2d 841 (8th Cir. 1971), or involved a situation in which the defendant pleaded lack of jurisdiction in its answer, then filed a stipulation admitting jurisdiction, and then two years later, after the statute of limitations had run on the plaintiff's claim, attempted to raise the same jurisdiction issue it initially pleaded. *DiFrischia* v. *New York Central Railroad Co.*, 279 F. 2d 141 (2d Cir. 1960).[17] None of these cases, therefore, supports an estoppel argument in the present case.

Accordingly, for the reasons stated herein, we vacate the October 15, 1976 order and remand to the district court for further proceedings consistent with this opinion. The parties shall bear their respective costs.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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17. This case has been limited in its application to its unusual facts. *See, e.g., Joyce* v. *United States*, 474 F. 2d 215, 218 n.1 (3d Cir. 1973).

OPINION BY JUDGE PELL

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 24, 1978.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge**

In Re: CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES, No. 77-1325 Appeal of: AMERICAN AIRLINES, INC., and TRANS WORLD AIRLINES, INC.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 70-C-2069, 70-C-2071, 72-C-498, 74-C-2063, 74-C-2762. Frank J. McGarr, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the district court properly granted summary judgment in favor of the plaintiffs; and the order of October 15, 1976 is VACATED and REMANDED, in accordance with the opinion of this court filed this date. Each party shall bear its respective costs.

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* Although Judge Sprecher heard oral argument, he later disqualified himself from any participation in the decision, and preparation of the opinion, in this case.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 11, 1979.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

In Re: CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES, No. 77-1325 Appeal of: AMERICAN AIRLINES, INC., and TRANS WORLD AIRLINES, INC.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 70-C-2069, 70-C-2071, 72-C-498, 74-C-2063, 74-C-2762. Frank J. McGarr, *Judge.*

On consideration of the petition for rehearing filed in the above cause by defendant-appellant, Trans World Airlines, Inc., all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

The petitioners, Anne B. Zipes, et al., have petitioned for modification of the opinion to state that the class includes those female cabin attendants who were terminated after May 31, 1970, the conclusion of the 90-day period. We deem it unnecessary to modify the opinion because the opinion as written

includes those terminated after May 31, 1970. The petitioners also seek modification of the opinion to include in the class employees whose maternity leaves of absence expired during the 90-day filing period. This request is denied because all are of the opinion that permanent termination occurred *in actuality* when a child was born or adopted. See Slip Op. at 14 n. 13.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

IN RE CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES	Master File No. 70 C 2071 This document relates to: No. 70 C 2069 No. 70 C 2071 No. 72 C 498 No. 74 C 2063 No. 74 C 2762

MEMORANDUM OPINION AND ORDER

On November 18, 1974, The Honorable Richard J. McLaren issued a memorandum opinion and order allowing defendants Trans World Airlines, Inc. and American Airlines, Inc. to amend their answers to include the "affirmative defense" of the statute of limitations contained in 42 U.S.C. § 2000e-5e. This statute imposed a ninety-day period after an alleged unlawful practice within which a charge could be filed with the Equal Employment Opportunity Commission. Judge McLaren noted and left open the question of whether defendants' delay in pleading the defense of limitations constituted a waiver of the defense.

Defendants are now moving to exclude certain persons of plaintiffs' class for lack of subject matter jurisdiction, urging that Title VII's time limits are not a matter of defense but are, rather, jurisdictional prerequisites not subject to waiver by the actions of the defendants. Factually, they are seeking to exclude all persons whose employment was terminated on the grounds of pregnancy more than ninety days prior to May 31, 1970, the

date of filing by the original plaintiff-union, Air Line Stewards and Stewardesses Association, Local 550.

Several courts have recently considered the question of whether Title VII's time limits are in the nature of statutes of limitations or jurisdictional prerequisites, and have concluded the former. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924 (5th Cir. 1975); *Dartt* v. *Shell Oil Co.*, ... F. 2d ....., 13 FEP Cases 12 (10th Cir. 7/22/76); 408 F. Supp. 229 (D. Conn. 1976).

The Seventh Circuit, however, has characterized the issue is jurisdictional. *Choate* v. *Caterpillar Co.*, 402 F. 2d 357 (7th Cir. 1968); *see*, also, *Evans* v. *United Air Lines, Inc.*, 534 F. 2d 1247 (7th Cir. 1976); *McGuire* v. *Aluminum Company of America*, ... F. 2d ....., No. 76-1013 (7th Cir. 9/9/76). This court is persuaded that the Seventh Circuit holding is correct and that the time requirements of Title VII are jurisdictional in nature.[1]

Having so decided, the next question for resolution is whether the claims of certain class members are time-barred. Defendants' motion is grounded upon the assumption that the violation occurred at the moment of termination due to pregnancy and, therefore, the ninety days began to run for each class member at that moment. Plaintiffs, on the other hand, assert the existence of a "continuing violation" which existed at least until the airlines abandoned their policy of refusing to rehire mothers.

We agree with the plaintiffs' view of this action. If this case sought only to challenge the policy of firing pregnant stewardesses, we would agree that the ninety-day limit began to run at the moment of termination. But, as noted in our memorandum opinion and order dated April 28, 1976, this case challenges a policy much more broad than that. It challenges the "no mother-

1. Plaintiffs urge that this court should estop the defendants from raising the jurisdictional question. E.g., *DiFrischia* v. *New York Central Railroad*, 279 F.2d 141 (3rd Cir. 1960). Because of the view we take of this case, we need not reach this extraordinary estoppel question.

hood" policy which begins at pregnancy, yet continues to prevent re-hiring of the alleged class members once pregnancy is at an end. Thus, we find a continuing violation of plaintiffs' rights which existed until the time that defendants changed the challenged policy.[2] *See Boudreaux* v. *Baton Route Marine Contracting Co.*, 437 F. 2d 1011 (5th Cir. 1971); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (D. C. Cir. 1973). Because of the essential difference between the parties as to the nature of the violation here, and the court's agreement with the plaintiffs' position, defendants' authorities do not compel a different result.[3]

For the foregoing reasons, defendants' motion to exclude certain persons from the class for lack of subject matter jurisdiction is hereby denied.

ENTER:

/s/ FRANK J. MCGARR
United States District Judge

Dated; October 15, 1976

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2. We note further, although we do not base our holding today thereon, plaintiffs' allegations that the effects of the discriminatory policy continued past that date as to all stewardesses who were not rehired pending the outcome of this case because they failed to waive their claims to back-pay. The allegation with respect to back-pay appears to be within the scope of *Evans* v. *United Airlines, Inc., supra.* Perpetuation of a disadvantage suffered because of a past discrimination is itself a violation thereunder.

3. We have considered, too, the Memorandum of Movants for Intervention in Reply to Plaintiffs' Memorandum in Response to Defendants' Motion to Exclude Certain Persons From the Class. The memorandum is directed basically towards a final remedy in this case and against various allegations made by plaintiffs with respect to this predecessor union's good faith. That memorandum does not call for a different result within the context of this motion.

MEMORANDUM OPINION AND ORDER IN NOS. 70 C 2069 AND 70 C 2071

(Entered November 20, 1974)

These actions are class action Title VII equal employment sex discrimination cases challenging the practice of Trans World Airlines and American Airlines of terminating the employment of pregnant stewardesses. The cases are now before the Court on defendants' motions to amend their answers to include the affirmative defense of the statute of limitations.[1] Plaintiffs oppose these motions, asserting that (1) defendants have been guilty of unreasonable delay in asserting this defense, and (2) justice does not require defendants' being granted leave to amend because it would be unduly prejudicial to plaintiffs.

The following facts are relevant to disposition of these motions:

The complaints were filed on August 18, 1970, and defendants' answers were submitted to the Court on September 30, 1970.[2] There were no further proceedings in Court until July 16, 1971, when a settlement agreement was filed. But in the interim the airlines and the union amended their labor agreements to eliminate pregnancy as a ground for termination, and negotiated the settlement agreement. The hearing on that agreement began on March 10, 1972; the intervening delays was

1. The statute of limitations for Title VII actions is contained in 42 U. S. C. § 2000e-5e. At the time these actions were filed, the statute provided that to sustain an action under Title VII a charge must have been filed with the Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred. The time limit was increased to 180 days by the amendment of March 24, 1972 (P. L. 92-261, § 4).

2. Defendants' answers contained two other affirmative defenses: first, that defendants' conduct was based upon a continuing policy which was a "bona fide occupational qualification reasonably necessary to the normal operation' of defendant's business within the meaning of 42 U. S. C. § 2000-2(e)," and the second, that the policy is "pursuant to a 'system which measures earnings by quantity and quality of production' within the meaning of 42 U. S. C. § 2000e-2(h)."

caused by the effort of the EEOC to intervene, including its appeal to the Seventh Circuit. On April 11, 1972, several plaintiffs filed their notices of appeal from the order approving the settlement agreement. Their appellants' brief was not filed until February 5, 1973. The Seventh Circuit decision reversing the order approving settlement was issued on December 23, 1973,[3] the Supreme Court denied a writ of certiorari on May 13, 1974. The case was assigned to this Court on July 11, 1974. TWA and American then filed their motions to amend the answers on September 11, 1974, the date set by the Court for a status report.

F. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." The Supreme Court in *Forman* v. *Davis*, 371 U. S. 178, 182 (1962) held that this mandate is to be heeded, stating:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' "

In the instant actions, plaintiffs could be unduly prejudiced by amendment. The absence of the defense of limitations could have been considered by the present plaintiffs when they rejected the union-airlines settlement agreement and appealed the orders approving settlement to the Seventh Circuit. At that time plaintiffs could reasonably believe that the pleadings were completed especially considering the class allegations contained in these

3. In *Air Line Stew. & S. Ass'n, Local 550* v. *American Airlines*, 490 F. 2d 636 (7th Cir. 1973), the court of Appeals reversed the settlement order previously entered in these actions. The court held that the Union could not act as representative of the individual stewardesses terminated because of conflict of interest in the Union over such matters as seniority. Moreover, the court determined that these actions should proceed as R. F. Civ. P. 23(b)(3) class actions instead of F. R. Civ. P. 23(b)(2) class actions.

actions. Notice of the proposed settlement to members of the classes invited "any interested person or attorney" to inspect "all pleadings and other documents in the action." None of the documents apparently contained any notice of the statute of limitations defense althought the Union's attorney did mention the possibility of the defense during oral hearings on the settlement agreement.

Plaintiffs also argue that even if undue prejudice cannot be shown, defendants should not be allowed to amend because they have been guilty of undue delay in asserting the limitations defense. Defendants justify their delay in filing the defense on three grounds: (1) legal uncertainty about availability of the defense; (2) active participation in the aborted settlement negotiations and (3) no district court judge had jurisdiction over the actions while the various appeals were pending.

Defendants assert that when the complaints were filed in 1970, there had been few decisions construing the limitations problems inherent in Title VII class actions. It is important to note, however, that defendants do not claim that the limitations language of the statute was ambiguous, nor do defendants assert that there were no cases to rely on for guidance. In fact, defendants cite a 1969 case, *Burney* v. *North American Rockwell*, 302 F. Supp. 86 (C. D. Cal. 1969), to support their substantive point that the Title VII statute of limitations affects unnamed class plaintiffs as well as named or individual plaintiffs.

Moreover, defendants make no showing how these proceedings could have prevented them from making a motion to the Court to amend their answers, particularly when defendants original answers contained two other affirmative defenses. Additionally, the existence of this defense, properly plead, should have been a factor in defendants' posture during this stage of the litigation. That defendants failed to fully investigate the legal status of plaintiffs' claims at that time only demonstrates that defendants may not have completely prepared during settle-

ment negotiations, not that the negotiations themselves prevented defendants from presenting their legal arguments to the Court.

Defendants' third argument that the pending appeals prevented them from amending also seems inequitous. While it is true that for substantial periods since filing in 1970 no district court judge had jurisdiction over these cases, defendants do not satisfactorily explain why when the district court did have jurisdiction (from filing in 1970 to April 1972), they made no motion to amend.

Defendants' delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense; at this juncture, however, the Court is not convinced to a legal certainty that pleading of the defense shall not be allowed. Under the liberal pleading rules contained in Rule 15, defendants should be entitled to prove through discovery techniques or otherwise that the plaintiffs suffered no prejudice or that the delay in amendment was excusable. Defendants' motion to amend their answers is granted.[4]

IT IS SO ORDERED.

Entered:

/s/ R. W. McLaren

Dated: November 18, 1974. *United States District Judge*

4. Of course, this disposition of defendants' motions is not intended to express any ultimate views on the waiver or laches issues or the substantive applicability of the 180 day statute of limitations.

EXCERPT FROM TRANSCRIPT OF HEARING WHICH COMMENCED ON MARCH 10, 1972

We have agreed that all these girls, all these girls who were terminated, whether by resignation or involuntarily, may go back to work.

The Court: In other words, you are waiving any question of statute of limitations, if there is one?

Mr. Carr: That is correct. Furthermore, we have made a concession that they can choose the [546] base from which they can operate. In the case of a married girl, this is an important concession. In addition, we are giving them the full seniority they left with, and that is what the girls under the present leave of absence agreement have. They do not come back with seniority for the time they were off. They come back with seniority as of the time they left.

Now, this seniority need not have been given to them at all on a settlement agreement, but they were given the full seniority they had earned, and this was, as Mr. Feldman pointed out, in derogation of those girls who are presently flying.

Now, I think I have said enough to suggest that on the issues in this case, the outcome is at least questionable, that very substantial benefits accrued to these girls, and I think there is no question but what the settlement is fair, unless you are propagandized into or have persuaded yourself into an attitude that there is nothing to this case but walking into court and getting all the results that would come from an adjudication on the merits.

[547] We are a long way from an adjudication on the merits. We are an even longer way, conceptually, from an adjudication on the merits in favor of the plaintiffs. I would like now briefly to turn my attention to 23(b)(2). There have been various comments about separate classes in this case—

The Court: Just a moment, please.